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In The Supreme Court of the United States

SHOZDIJIJI SHISINDAY, a/k/a DANNY DEAN THOMAS,

Petitioner,

v.

NATHANIEL QUARTERMAN

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JURORS FOR JUSTICE AMICUS BRIEF IN SUPPORT OF SHOZDIJIJI SHISINDAY'S PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

Jurors for Justice is a national grassroots organization comprised of citizens who have been through the gut-wrenching experience of voting to sentence a defendant to death only to subsequently learn either that the defendants they convicted were innocent and exonerated based on information not presented during trial, or learn that they were provided incomplete and/or misleading information during the sentencing proceedings.[1]

Jurors for Justice believes jurors have the enforceable right to be fully informed during sentencing proceedings and the right never to be misled during sentencing proceedings when jurors literally are called upon to "play God" and decide whether a fellow human being should be put to death. The members of *Jurors for Justice* wish to inform reviewing courts of their unique perspective that when ordinary men and women serve on capital juries, their decisions weigh heavily, and their lives are forever changed by the knowledge that they were misinformed or misled when they voted to sentence a fellow human being to death.

SUMMARY OF ARGUMENT

This Court should grant *Certiorari* and hear Mr. ShisInday's appeal because it will provide a

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel made any monetary contribution toward the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk pursuant to Rule 37.3.

unique opportunity to examine an unconstitutional Texas statute which violates jurors' rights by affirmatively misleading them into voting for death. Sociological research and empirical studies demonstrate capital jurors are under tremendous amounts of stress throughout service and oftentimes develop varying levels of physical or mental impairment. Studies and research also demonstrate jurors have a "tilt toward" death in their interpretation of jury instructions. The risk for an arbitrary sentencing verdict is dangerously high under TCCP Article 37.0711 because it misleads these impaired jurors into believing ten votes are required for life when in fact only one vote is necessary. By the time the jury is called upon for sentencing deliberation, their respective physical or mental impairments are likely at a peak thus explaining why holdout jurors, such as the three holdouts in Mr. ShisInday's case, eventually succumb to the death vote.

TCCP Article 37.0711 affirmatively misleads jurors about their role in sentencing by clouding their right to be informed with silence concerning the consequences of a deadlock. Numerous Supreme Court cases guarantee various rights to jurors which are categorically ignored by the statutory scheme at work in Texas; a scheme that basically requires jurors to be lawyers and analytically conceive what the deadlock consequences would be. By examining this scheme, this Court can save lives and preserve jurors' collective rights to be informed and never misled in the sentencing process.

ARGUMENT

This Court should grant *Certiorari* and hear Mr. ShisInday's appeal about how an unconstitutionally misinformed Texas jury was hopelessly forced by statute to vote for his death on a Sunday. Capital Jurors in Texas are systematically and unconstitutionally misinformed to tilt their sentencing decisions towards death. "They are for the most part highly dedicated, well-meaning people who work extremely hard...to do the moral dirtywork of a system that is not even honest enough with them to insist they have the full story..." Craig Haney, Ph.D., *The Capital Jury Project: Taking Capital Jurors Seriously*, 70 Ind. L.J. 1223, 1232 (1995).

I. Members of Capital Juries Have Rights From Summons to Verdict

America's enduring criminal jury system is one of its most cherished institutions. "I would rather trust my life, liberty and property to a verdict of twelve of my honest neighbours, than to the opinion of any great man in the world, for great men are not always honest men." *Letters From A Countryman*, reprinted in 6 THE COMPLETE ANTI-FEDERALIST 69, 73 (Herbert J. Storing ed., 1981). The criminal jury is distinguished as "the only guarantee to appear in both the original text of the Constitution and the Bill of Rights." Kenneth Klein, *Unpacking the Jury Box*, 47 Hastings L.J. 1325, 1337 (1996). As participants in this glorious tradition, ordinary folk summoned for jury duty are guaranteed certain rights. *See e.g.*, *Press Enterprise*

Co. v. Superior Court of California, 464 U.S. 501 (1984) (right against disclosure of private information); *Batson v. Kentucky*, 476 U.S. 79 (1986) (right to nondiscrimination in the jury selection process).

Once selected for criminal jury duty, the juror succeeds to even more rights. For example, jurors cannot be "affirmatively misled regarding [their] role in the sentencing process," *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994), nor can jurors be misled in a fashion which "diminishe[s] the jury's sense of responsibility." *Caldwell v. Mississippi*, 472 U.S. 320, 342 (1985) (O'Connor, J. concurring). *See also Jones v. U.S.*, 527 U.S. 373, 381-82 (1999) ("the District Court's failure to instruct the jury as to the consequences of a deadlock could give rise to an Eighth Amendment problem" if the jury was "affirmatively misled regarding its role in the sentencing process").

II. The Juror's Right to Information

In *Gregg v. Georgia*, 428 U.S. 153 (1976), this Court acknowledged that jurors have "little, if any, previous experience in sentencing . . . [and] are unlikely to be skilled in dealing with the information they are given." *Id.* at 192. Because jurors are not skilled at making life-and-death decisions, this Court stated "[w]e think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision." *Id.* at 204. This "guidance requirement" established in *Gregg* is a right which inures to all jurors and is a right that is

ignored when jurors are misled regarding their role in the sentencing process.

Because "jury duty is both a civic responsibility and an obligation of all qualified citizens," *The ABA Principles for Juries and Jury* Trials, 11 (2004), it is repugnant to our national conscience that jurors would be misled regarding their role in sentencing a man to death. That jury members deserve not only "*Gregg* guidance" but accurate information to fulfill their shared civic responsibility was recognized by this Court in *California v. Ramos*, 463 U.S. 992 (1983). In *Ramos*, this Court upheld a state law requiring judges to inform the jury that the governor may commute a life sentence to a sentence that includes the possibility of parole. *Id.* at 1013. This Court reasoned that "informing the jury of the Governor's power to commute a sentence of life without [the] possibility of parole was merely an accurate statement of a potential sentencing alternative." *Id.* at 1009. Pursuant to *Ramos*, jurors thus are guaranteed accurate information concerning sentencing alternatives. However, in this case Mr. ShisInday's jurors were deprived of their rights under *Gregg* and *Ramos*, and as a result Mr. ShisInday is scheduled to die in Texas.

III. Juror Rights Should Increase as the Juror's Mind and Body Deteriorates Through Service

The rights granted capital jurors under *Gregg* and *Ramos* are absolutely vital because jurors are frequently injured in body and mind during both the

criminal trial itself and the sentencing proceedings. "A number of researchers have reported that jurors feel stress at every stage of jury duty." Miller & Bornstein, *Juror Stress: Causes and Interventions*, 30 T. Marshall L. Rev. 237, 239 (2004). It is not unheard of for jurors to be excused for health problems caused by serving on a capital jury. *See People v. Torres*, 2002 WL 187175 (Cal. App. 2 Dist. Feb. 6, 2002) (no error in removing pregnant juror for stress stemming from conflicts during deliberation). Capital murder trials visit additional mental and physical burdens upon the jury than simply stress.

According to a study by the National Center for State Courts, 44% of jurors suffer anxiety when faced with the guilt/innocence choice during sentencing proceedings. National Center for the State Courts, *Through the Eyes of a Juror: A Manual for Addressing Juror Stress*, available at http://www.ncsconline.org/WC/Publications/Res_Juries_JurorStressIndexPub.pdf (Mar. 12, 2002). Furthermore, in a University of Cincinnati College of Medicine study, researchers analyzed four juries (including 2 murder trials) and found gastrointestinal distress (10 jurors); generalized nervousness (4 jurors); heart palpitation (6 jurors); headaches (4 jurors); sexual inhibitions (4 jurors); depression (4 jurors); anorexia (4 jurors); faintness (2 jurors); and numbness, lump in throat, chest pain, hives, and flu (1 juror each). Kaplan & Winget, *The Occupational Hazards of Jury* Duty, 20 Bull. Am. Acad. Psychiatry Law 325-33 (1992). Another well-known study concluded, "[i]t is clear that jurors are at an increased risk of suffering from depression

resulting from their participation in traumatic trials. It is also clear that the judicial system has a responsibility for the harm it causes jurors." Daniel Shuman, *The Health Effects of Jury Service*, 18 Law & Psychol. 267, 302 (1994).

Based upon the aforementioned studies, jurors in a criminal case are in a progressively worsening state of mental and physical impairment during trial and sentencing. This makes it all the more vital that these jurors receive increased guidance and access to accurate information about sentencing and its alternatives. Application of these studies to this case demonstrates Mr. ShisInday's jurors were in desperate need of the accurate legal point that only the vote of a lone juror was necessary for a life sentence, but Texas law unconstitutionally prevents that information from being given.

According to a study of Indiana jurors by Professor Joseph Hoffman, "after the trial was over, many jurors suffered lingering traumatic effects from their experience." Hoffman, *Where's the Buck? – Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 Ind. L.J. 1137, 1156 (1995). The members of *Jurors for Justice* are intimately familiar with these lingering traumatic effects and humbly seek this Court's intervention to vindicate not only the rights of Mr. ShisInday and the misled jurors in his case, but also to protect the rights of those capital jurors who will receive a capital jury summons from the State of Texas in the future.

IV. Mr. ShisInday's Case Provides this Court a Chance to Reconsider its *Certiorari* Denial in *Brown v. Texas*

"How capital jurors should make the life or death sentencing decision is a critical issue at the core of modern capital jurisprudence." Bowers & Steiner, *Death By Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605, 608 (1999) (hereinafter, "*Death By Default*"). Mr. ShisInday's case is from Texas, and four members of this Court voted to consider the Texas capital jury's role in sentencing in *Brown v. Texas*, 522 U.S. 940 (1997) (opinion of Stevens, J. on denial of *Certiorari*). In *Brown*, Justice Stevens stated, "[t]he situation in Texas is especially troubling." *Id.* at 942. Through an example analogous here because of its shared result, Justice Stevens added,

> [i]n...noncapital cases, Texas law requires that the jury be given an instruction explaining when the defendant will become eligible for parole. Thus, the Texas Legislature has recognized that, without such an instruction, Texas jurors may not fully understand the range of sentencing options available to them. Perversely, however, in capital cases, Texas law *prohibits* the judge from letting the jury know when the defendant will become eligible for parole if he is not sentenced to death. The Texas rule unquestionably tips the scales in favor

> of a death sentence that a fully informed jury might not impose."

Id. at 942 (emphasis in original).

While Mr. ShisInday's case does not involve informing the capital jury about the possibility of parole, it does involve a statutory prohibition that affirmatively misinforms the jury of sentencing options, which in turn has the effect of predisposing the jury to impose the death penalty. "[T]here is great similarity between the issue of jury instructions regarding the death sentence alternative, as addressed...in *Brown*, and the issue of jury instructions regarding the consequences of deadlock," as is presented by Mr. ShisInday's case. Laurie Berberich, *Jury Instructions Regarding the Deadlock in Capital Sentencing*, 29 Hofstra L. Rev. 1301, 1323 (2001).

Empirical jury research vindicates the concerns of the *Brown* dissenters. "Research on jurors' understanding of capital sentencing instructions indicates that there is a 'tilt toward death' in their interpretations of the instructions." *Death By Default*, at n. 228, citing Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1, 20 (1993) (hereinafter, "*Deadly Confusion*"). According to The Capital Jury Project, "[i]nterviewers found that jurors had profound misunderstandings of the law that tilted the balance toward death...Interviewers also found that jurors chose death simply to avoid a hung jury." Janet Hoeffel, *Risking the Eighth Amendment: Arbitrariness, Juries and Discretion in*

Capital Cases, 46 B.C. L. Rev. 771, 791 (2005). Based upon this research, this Court should ensure Texas juries are no longer affirmatively misled to sentence defendants to death, as occurred in Mr. ShisInday's case.

A "fatal mistake" occurs where "a defendant is sentenced to death because the jury was misinformed...The justice system should be designed to prevent such a tragic error." *Deadly Confusion*, at 1. In the words of Justice Souter, "it is intolerable for the judicial system to treat people this way..." *Bowles v. Russell*, 127 S. Ct. 2360, 2367 (2007). The opportunity to confront this pernicious error, and save lives, is presented with Mr. ShisInday's Petition for *Certiorari*. Now is the time for this Court to ensure future Texas juries are no longer affirmatively misled when "confronted with the truly awesome responsibility of decreeing death for a fellow human." *McGautha v. California*, 402 U.S. 183, 207-208 (1971).

V. The ShisInday Jury Had the Right Not to be Misled Regarding the Consequences of a Deadlock

The instructions the jury is given should fully apprise the jury regarding how many votes it takes for a life sentence. The jury cannot be "affirmatively misled regarding its role in the sentencing process." *Jones v. U.S.*, 527 U.S. 373 (1999) citing *Romano*, 512 U.S. at 9. "The potential for coercion exists when a trial judge inquires as to the nature or extent of [the jury's] division and then instructs the jury to continue deliberating." *Coleman v. Quarterman*, 456

F. 3d 537, 548 (Tex. 2006) citing *Lowenfield v. Phelps*, 484 U.S. 231, 239-40 (1988). In *Jenkins v. U. S.*, 380 U.S. 445, 446 (1965), after two hours of deliberations the jury sent a note to the trial judge advising that it had been unable to agree upon a verdict "on both counts because of insufficient evidence." *Id.* The judge thereupon recalled the jury to the courtroom and stated "You have got to reach a decision in this case." This Court held this admonition was coercive and remanded the case for a new trial. *Id.*

However, in this case, the jurors who were deciding whether Mr. ShisInday should die were not properly informed as to how many votes were necessary for a life sentence. The jury instructions[2]

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[2] The special issues submitted pursuant to article 37.071 of the Texas Code of Criminal Procedure provided as follows:

Special Issue No. 1
Was the conduct of the defendant, Shozdijiji ShisInday also known as Danny Dean Thomas, that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

Special Issue No. 2
Is there a probability that the defendant, Shozdijiji ShisInday also known as Danny Dean Thomas, would commit criminal acts of violence that would constitute a continuing threat to society?

Special Issue No. 3
Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, that there is a sufficient mitigating circumstance or circumstances to warrant that a

mandated by TCCP Article 37.0711 led the ShisInday jurors to believe only two results were possible: either a unanimous vote for death or a vote of at least ten for life. Contrary to the jury instructions given, a sentence of life required only one vote. In *Prystash v. State*, 3 S.W.3d 522 (Tex. Crim. App. 1999), *cert. denied*, 529 U.S. 1102 (2000) a Texas court attempted to justify this injustice by reasoning,

> the appellant asserts that the refusal of the trial court to instruct the jury that a life sentence would be imposed if they failed to answer a special issue is reversible error. There is no constitutional prohibition to concealing from the jurors the consequences of their deliberations, so long as they are not misled into believing that ultimate responsibility for the verdict rests elsewhere. . . . The jury is not informed of the consequences of a hung jury, but each juror will know that without his or her vote the death sentence cannot be imposed.

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sentence of life imprisonment rather than a death sentence be imposed?

You are instructed that in answering this "Special Issue that you shall answer the Issue "Yes" or "No." You may not answer this Issue "No" unless you agree unanimously, and you may not answer this Issue "Yes" unless ten (10) or more of you agree to do so. You shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness. (App. C at C7-8).

Id. at 532. *Jurors For Justice* respectfully disagrees with *Prystash* and its progeny. The notion that jurors are capable of engaging in what is tantamount to the legal construction of Article 37.0711 and determine that the unanimity requirement for a death sentence prevails over the requirement of at least 10 votes for a life sentence, such that a single juror alone can insist on a sentence of life is directly contrary to this Court's holding in *Gregg* that jurors have "little, if any, previous experience in sentencing . . . [and] are unlikely to be skilled in dealing with the information they are given." 428 U.S. at 192. *See also Carter v. Kentucky*, 450 U.S. 288, 303 (1981) ("Jurors are not lawyers..."). *Prystash* and its progeny are based on the express intention that capital jurors be deceived into believing they have the either-or proposition of a unanimous verdict for death or at least 10 votes for a life sentence in order to predispose the jurors into voting for death. Jurors who are unskilled at dealing with information regarding sentencing will be far better served if they are instructed that a unanimous verdict is required for a death sentence, and in all other circumstances the sentence must be life. The fact TCCP Article 37.0711 does not utilize such simplicity and clarity, and instead opts for a deliberately confusing and disingenuous approach, proves the ulterior motive is to predispose the jurors in favor of a death sentence.

This is borne out by the record in this case. This jury was deadlocked on the issue of death for four days with three jurors holding out of life, two of

which stated they were "holding firm" and one juror indicating that he would hold out "for all eternity." (App. P at P2). In addition to that note, the judge also received notes indicating a 9-3 vote and that "continued deliberations are futile." (App. C at C26). Despite the holdouts, the trial judge continued to send back notes indicating the jury should continue deliberating.[3] After four days of deadlock, and no information or understanding that a life sentence could be imposed without any additional votes, the three hold-outs were coerced into siding with the majority in favor of death.

In matters of life and death, capital jurors should not be misled and biased in favor of voting for a death sentence. Texas law allows for capital jurors to be deceived in that they are not told that only a single vote is necessary for a life sentence, and the rationalization for this deception – that jurors are capable of engaging in *de facto* statutory construction and can decipher a facially ambiguous instruction – simply cannot be considered constitutionally valid. The members of *Jurors for Justice* have suffered this deception and must live with the knowledge that they could and would have spared defendants from death if they had only been told the truth.

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[3] The judge sent back two notes stating, "Please continue your deliberations." (App. C at C27-8).

CONCLUSION

For the foregoing reasons, *Jurors for Justice* requests that the Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

Dated: June 6, 2008

Respectfully Submitted,

Jurors for Justice

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